



- (3) The nature and extent of claimant's injury and/or disability.
- (4) The amount of compensation due.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a laundry room worker for respondent, had been so employed for approximately two years. Claimant had performed similar work duties at the same location for several years when the hotel was under different names. Claimant's duties required her to place bed linens and towels in an industrial washing machine, remove linens from the washer and place them in a large dryer, and upon completion of the drying cycle, fold linens and place them on shelves. In late spring 1994, claimant began experiencing numbness and tingling as well as pain in her bilateral upper extremities. She notified her supervisor of her ongoing symptomatology but was provided no medical care. She then contacted her own personal physician, Dr. Anil V. Gosalia, in early July 1994, while continuing to work through September 7, 1994, her last day of work with respondent. Claimant was denied authorized medical treatment until the matter went to preliminary hearing on December 14, 1994, at which time claimant was granted medical treatment and temporary total disability compensation at the expense of the Fund.

In January 1995, claimant was examined by Dr. William O. Reed, Jr., a board-certified orthopedic surgeon, who ultimately performed surgery on claimant's right upper extremity on March 10, 1995. Dr. Reed recommended additional surgery on claimant's left upper extremity but due to the less than satisfactory result from the surgery, claimant declined. Claimant was then released on March 31, 1995, by Dr. Reed.

Claimant did attempt to return to work with respondent in May 1995 for a brief period but, because of her physical difficulties and limitations, was unable to satisfactorily perform the job. Claimant then left her employment with respondent and has been unemployed since that time. Claimant has attempted to find other employment since that time but has been unsuccessful.

The medical records support a finding that claimant sustained cumulative micro-traumas to her upper extremities resulting in bilateral carpal tunnel syndrome and flexor tendinitis.

Claimant was examined by Dr. Nathan Shechter, a board-certified orthopedic surgeon, on October 2, 1995, as a court-ordered independent medical examination. Dr. Shechter diagnosed claimant with bilateral upper extremity problems including carpal tunnel syndrome and rated her at 16 percent permanent partial disability to the body as a whole. He placed restrictions upon claimant recommending she not return to her previous employment as a laundry room worker. Dr. Shechter, in reviewing the claimant's past task-performing history, felt she had suffered a 50 percent loss of task performing abilities for the tasks performed during the claimant's preceding 15 years of employment.

Claimant was examined by Dr. P. Brent Koprivica, a board-certified emergency room physician, on June 7, 1995. Dr. Koprivica, in testifying on behalf of the claimant, felt claimant had a 17 percent permanent partial impairment of function to the body as a whole as a result of her upper extremity injuries. He went on to opine that claimant had sustained a 67 to 75 percent loss of her task performing abilities when considering the tasks claimant had performed for the 15 years preceding her date of injury.

Claimant was also examined by Mr. Michael Dreiling, a vocational rehabilitation counselor, on December 6, 1995, at the request of the Kansas Workers Compensation Fund. Mr. Dreiling felt claimant had sustained no loss of ability to earn comparable wages, being able to earn a wage equal to that which she was earning with the respondent at the time of the injury. Mr. Dreiling also went on to provide an opinion regarding claimant's loss of task performing abilities.

K.S.A. 44-510e(a) states:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

As K.S.A. 44-510e is clear in its requirement that claimant's task performing loss be expressed in the opinion of a physician, the Appeals Board finds that the opinion by Mr. Dreiling is not competent evidence upon which to base a workers compensation award. Therefore, the Appeals Board considers the opinions of Dr. Shechter and Dr. Koprivica as competent evidence upon which to base claimant's loss of task performing abilities, but rejects the opinion of Mr. Dreiling.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board has reviewed the opinions of both Dr. Shechter and Dr. Koprivica. Neither Dr. Shechter nor Dr. Koprivica was provided a totally accurate history of claimant's past work history. Both discussed prior jobs that claimant had worked and the tasks associated with those jobs but neither was in a position to discuss a totally accurate analysis of claimant's job task loss, having each been provided different work histories. As such, the Appeals Board finds neither doctor to be totally credible in his opinion. The Appeals Board also is reluctant to reject both doctors' opinions as they are opinions based upon some relevant evidence provided by claimant and involving claimant's past work task history. As such, the Appeals Board will give equal weight to the opinions of Dr. Shechter and Dr. Koprivica in deciding what task loss claimant has suffered as a result of these injuries. Dr. Shechter's opinion, while somewhat unsupported by his testimony, did indicate a 50 percent loss of task performing abilities. Dr. Koprivica, when provided additional information regarding claimant's past work history, opined claimant had suffered a 75 percent loss of task performing abilities. In comparing the two, and in reviewing the evidence in the record showing what tasks claimant is able to perform before and after the accident, the Appeals Board finds claimant has suffered a 62.5 percent permanent partial loss of task performing abilities as a result of the injuries suffered through September 7, 1994.

K.S.A. 44-510e requires claimant's loss of task performing abilities be averaged together with the difference between the wage claimant was earning at the time of the injury and the average weekly wage the worker is earning after the injury. The Fund argues that claimant has maintained the ability to earn \$4.50 per hour per the opinion of Mr. Dreiling. Claimant, on the other hand, has testified to attempting to find work on several instances and having been unsuccessful so far in so doing. Claimant did attempt to return to work with respondent, but was physically unable to perform the job. The Fund cites Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), as applicable to the instant case. In Fouk claimant was offered a job within claimant's restrictions but claimant specifically refused to even attempt that job. The

Court of Appeals found that claimant should be entitled to no work disability due to claimant's refusal to attempt the job. The logic of the Court of Appeals in Foulk is apparent from the following language:

"Construing K.S.A. 1988 Supp. 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker has refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system. To construe K.S.A. 1988 Supp. 44-510e(a) as claimant suggests would be to reward workers for their refusal to accept a position within their capabilities at a comparable wage."

The Fund argues claimant should be denied any benefit for her loss of wage earning ability and should be imputed a wage-earning ability equal to that being earned at the time of the injury. The Appeals Board disagrees. Claimant attempted to return to work with respondent and was physically incapable of doing so. Dr. Shechter, the independent medical evaluator, opined that claimant should not return to her previous employment as a laundry room worker. This opinion was supported by that of Dr. Koprivica. This matter is not similar to Foulk in that claimant has not intentionally stayed out of the work force in order to increase her rights to workers compensation benefits. She has shown a willingness to return to work but unfortunately this is counterbalanced by an inability to perform many job tasks. As such, the Appeals Board rejects the Fund's argument that the logic of Foulk should apply and finds that claimant, in her inability to find work at this time, has suffered a 100 percent difference in pre- and post-injury earnings.

The language of K.S.A. 44-510e requires an averaging between claimant's loss of ability to perform work tasks and the difference between the average weekly wage claimant was earning at the time of the injury and that which claimant is earning after the injury. When comparing claimant's 62.5 percent loss of ability to perform work tasks with the 100 percent difference in earnings, the Appeals Board finds claimant has suffered a permanent work disability of 81.25 percent and awards claimant same.

In so finding, the Appeals Board finds claimant has not voluntarily removed herself from the labor market as argued by the Fund but rather claimant was removed from much of the labor market by her physical injuries.

The Appeals Board must next consider the issue of claimant's entitlement to temporary total disability compensation for the period September 8, 1994, the day after claimant's last day worked, through December 13, 1994, the day before claimant was ordered paid temporary total disability compensation by the Administrative Law Judge. Claimant testified to her inability to perform her work duties after September 7, 1994, due to the ongoing pain symptomatology she was experiencing. Claimant was examined by Dr. Michael J. Poppa at the request of the Fund on October 21, 1994. Dr. Poppa found claimant did not have bilateral upper extremity difficulties and returned claimant to work without restrictions. It is clear from the follow-up medical by both claimant's and the Fund's experts that Dr. Poppa's examination and diagnosis on October 21 was in error. Claimant suffered upper extremity problems to the extent that she underwent surgery in January with Dr. Reed. Dr. Reed even went so far as to recommend additional surgery to claimant's left upper extremity which claimant declined due to the unsatisfactory result from the first surgery. The Appeals Board finds the opinion provided by Dr. Poppa on October 21, 1994,

to be inaccurate and to be contradicted by the later findings of Dr. Shechter, Dr. Koprivica and Dr. Reed.

Dr. James P. Hopkins, claimant's expert, did diagnose upper extremity symptomatology on November 30, 1994, but made no comments regarding claimant's ability or inability to perform her job tasks. Thus, the only evidence in the record dealing with claimant's ongoing symptomatology and difficulties for the period in question is the testimony of the claimant. Claimant testified to ongoing difficulties experienced while working and stated she was forced to quit work because of the pain. The Appeals Board finds claimant's testimony to be credible in this regard and further finds that claimant was temporarily totally disabled as a result of her ongoing injuries for the period September 8, 1994, through December 13, 1994, and additional temporary total disability compensation during this period is ordered paid to claimant as a part of this award. In this regard, the Award of the Administrative Law Judge is reversed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of February 22, 1996, and the Order Nunc Pro Tunc of February 27, 1996, should be and are hereby modified and claimant is granted an award against the uninsured respondent, Civic Center Hotel, and the Kansas Workers Compensation Fund for an injury occurring through September 7, 1994, and based upon an average weekly wage of \$187.04 for an 81.25% permanent partial work disability for the injuries suffered through September 7, 1994. Claimant is further awarded temporary total disability compensation for the period September 8, 1994, through March 29, 1995, per the above findings.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Leola Taylor, and against the uninsured respondent, Civic Center Hotel, and the Kansas Workers Compensation Fund for an accidental injury which occurred through September 7, 1994, and based upon an average weekly wage of \$187.04, for 29 weeks of temporary total disability compensation at the rate of \$124.70 per week or \$3,616.30, followed by 325.81 weeks permanent partial general body work disability at the rate of \$124.70 per week or \$40,628.51 for an 81.25% permanent partial general body disability, making a total award of \$44,244.81.

As of July 18, 1996, there is due and owing claimant 29 weeks of temporary total disability compensation at the rate of \$124.70 per week or \$3,616.30, followed by 68.14 weeks of permanent partial disability compensation at the rate of \$124.70 per week in the sum of \$8,497.06, for a total of \$12,113.36, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$32,131.45 is to be paid for 257.67 weeks at the rate of \$124.70 per week, until fully paid or further order of the Director.

Claimant is awarded future medical upon application to and approval by the Director.

In all other regards, the Award and Order Nunc Pro Tunc of the Administrative Law Judge are affirmed insofar as they are not contrary to the opinions stated herein. Claimant is granted reimbursement of \$25 for medical expenses previously paid by her, payment of certain reasonable and necessary medical expenses, and unauthorized medical not to exceed \$500 pursuant to the findings of the Administrative Law Judge in his Award, paragraphs numbered 2, 3, 4 and 5.

The Kansas Workers Compensation Fund is liable for all compensation and benefits due herein with the exception of those listed in the Award as previously paid by the respondent. The Kansas Workers Compensation Fund is granted a cause of action against the respondent for all payments made by the Fund pursuant to this award and in accordance with K.S.A. 44-532a(b).

Claimant's contract of employment with her attorney is part of the record and is approved insofar as it is in compliance with K.S.A. 44-536.

The fees necessary to defray the expense of administration of the Kansas Workers Compensation Act are assessed against the respondent and, ultimately, the Kansas Workers Compensation Fund, to be paid as follows:

Richard Kupper & Associates	\$266.60
Hostetler & Associates, Inc.	\$435.75
Kelli Stewart, C.S.R.	\$242.25

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Kansas City, KS  
Civic Center Hotel, Kansas City, KS  
B. Scott Tschudy, Overland Park, KS  
Alvin E. Witwer, Administrative Law Judge  
Philip S. Harness, Director